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IN THE

Supreme Court of the United States

October Term, 1953

No. 85

JAMES W. MUIR,

Petitioner,

versus

LOUISVILLE PARK THEATRICAL ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In the

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No. 85

James W. Muir,

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versus

Louisville Park Theatrical Association,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I.

Jurisdiction.

The statement in the petition for the writ of certiorari that petitioner invokes the jurisdiction of this Court on the basis of Title 28, United States Code, Section 1251(1) is, of course, a typographical error. Jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

II.

The Questions Presented Are Not Moot.

Respondent raises the identical issue of mootness that it asserted in the Court of Appeals. By disposing of this

case on the merits, the Court of Appeals clearly indicated that this contention had no substance. It has no greater merit in this Court.

The petition for the writ of certiorari brought to the attention of the Court the fact that subsequent to the expiration of the 1947-1951 agreement, a new agreement was entered into between respondent and the City for the 1952 summer season. This agreement appears as Appendix A to the petition. While the petition did not state that theatrical performances were presented by respondent during the 1952 season, this is the fact. Significantly, respondent does not deny the existence of the 1952 agreement nor the fact that performances were given pursuant to it. The renewal of the 1952 agreement for the 1953 season was also set forth in the petition. Petitioner can now further advise the Court that musicals were again presented at Iroquois Amphitheatre during the months of July and August, 1953, for a six week season under the respondent's sponsorship.[1] Negroes were again denied admittance.[2] Respondent's Brief in Opposition likewise fails to deny any of the facts relating to 1953.

Respondent's argument thus narrows down to a highly technical contention that this Court is bound by the record and cannot consider events which have transpired subsequently. But this argument necessarily falls by the weight of its own fundamental inconsistency. Respondent's argument necessarily rests on the proposition that a court of equity looks to the future, *Douglas* v. *Jeanette*, 319 U. S. 157, 165, and will normally decide an appeal on the basis

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[1] The Louisville Courier Journal, July 5, 1953, § 5, p. 2, col. 1; id., July 12, 1953, § 5, p. 1, col. 4; id., July 19, 1953, § 5, p. 1, col. 4; id., July 26, 1953, § 5, p. 1, col. 4; id., Aug. 2, 1953, § 5, p. 1, col. 2; id., Aug. 9, 1953, § 5, p. 1, col. 4; id., Aug. 16, 1953, § 5, p. 1, col. 6. The Louisville Times, Aug. 11, 1953, p. 12, col. 1.

[2] The Louisville Defender, July 23, 1953, p. 1, col. 8.

of circumstances existing at the time of the appeal. *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 466; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637. However, in so doing, the Court must necessarily consider circumstances which have transpired subsequent to the entry of judgment in the trial court. This is a well established proposition. In deciding whether a question is moot, this Court will consider facts beyond the record. *Gray* v. *University of Tennessee*, 342 U. S. 517; *Doremus* v. *Board of Education*, 342 U. S. 429; *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 48-49; *Atherton Mills* v. *Johnston*, 259 U. S. 13; *United States* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466; *Alejandrino* v. *Quezon*, 271 U. S. 528, 535.

Similarly, in deciding cases on the merits, this Court has looked beyond the record to consider the effect of circumstances occurring after judgment in the trial court. *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *United States* v. *Trans-Missouri Freight Assoc.*, 166 U. S. 290, 308-9. In *Sweatt* v. *Painter, supra*, a new Negro law school had been put into operation after judgment had been entered in the trial court. In holding that Texas did not provide a law school education for Negroes equal to that provided for white students, this Court gave full consideration to the facts relating to the better facilities in the new law school. Similarly, in *McLaurin* v. *Oklahoma State Regents*, some of the more onerous restrictions which had been placed on McLaurin were removed between the time the decree was entered in the district court and the time the case was argued in this Court. This Court again looked beyond the record and considered the facts as they existed at the time of argument.

Petitioner merely asks the Court to follow the same procedure applied in *Sweatt*, *McLaurin* and numerous other

cases. Any other course would result in the grossest injustice imaginable. By utilizing successive lease agreements covering only a single summer, respondent could successfully frustrate petitioner's right of appeal, for the agreement in force at the time of the trial would have expired by the time of appeal. *Cf. Southern P. Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 498, 514-15; *Ford Motor Co.* v. *United States*, 335 U. S. 303, 312-13. This Court could hardly sanction such a result.

III.

Petitioner Was Refused Admission Pursuant to Rules and Regulations of the City of Louisville.

1. Respondent misconceives the reason for reliance on *Park Commissioners of Ashland* v. *Shanklin*, 304 Ky. 43, 199 S. W. 2d 721 (1947), and *Board of Park Commissioners* v. *Speed*, 215 Ky. 319, 285 S. W. 212 (1926). Petitioner does not ask the Court to grant the writ of certiorari in order to decide a question of Kentucky law. But we submit that the Kentucky decisions are indirectly relevant. The *Shanklin* and *Speed* cases state that a city department of parks cannot lawfully lease public park property to an independent proprietor and thereby relinquish control over its use. Hence, if the facts relating to the relationship between the City and respondent are at all equivocal—if there is some doubt as to the extent of control exercised by the City over the operations of respondent—this Court is justified in drawing the inference that the parties contracted with full knowledge of state law and thus intended that the City of Louisville retain the right to control the operations of respondent. This is merely an application of the well-established rule that where a contract is susceptible of two meanings, one legal and the other unlawful or contrary to

public policy, the former will be adopted so as to uphold the contract. *Great Northern Railway Co.* v. *Delmar*, 283 U. S. 686, 691; *Belcher Land Mortgage Co.* v. *Hazard Coal Corp.*, 15 F. 2d 481 (C. A. 6th 1926); *Chesapeake & O. R. Co.* v. *City of Morehead*, 223 Ky. 698, 4 S. W. 2d 726 (1928); *Leslie County* v. *Maggard*, 212 Ky. 354, 279 S. W. 335 (1926); 17 C. J. S., *Contracts*, Sec. 318.

2. Petitioner reasserts that the decisions in *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S. D. W. Va. 1948); *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N. E. 2d 82 (1948); and *Kern* v. *City Commissioners*, 151 Kans. 565, 100 P. 2d 709 (1940), are in sharp conflict with the instant case, notwithstanding respondent's attempt to harmonize them. In all cases Negro citizens were denied the use of a public facility by the use of a leasing arrangement. Any factual distinction between the cases rests on the differences between a swimming pool and an outdoor amphitheatre. A swimming pool is useful only in the summer. On the other hand, an outdoor amphitheatre has some usefulness in the other seasons, although its period of principal utility is certainly the summer months—the period covered by the leases between the City and respondent. Such a distinction between the instant case and *Lawrence*, *Culver* and *Kern* is hardly significant.

The instant case in fact presents a much stronger picture of state action violative of the 14th Amendment than that in any of the swimming pool cases. In the latter cases, as well as in *Harris* v. *City of St. Louis*, 233 Mo. App. 911, 111 S. W. 2d 995 (1938), each of the lessees formulated its own admission policy. No state policy—no state regulation—no state action of any kind was the immediate cause of the refusal to admit Negroes. In the instant case, however, City regulations require racial segregation in the use of the City's parks and Iroquois Park is designated for the exclusive use of white persons (R. 44). Significantly,

respondent, in answer to our fourth reason for the allowance of this writ, does not deny this. Thus, respondent's refusal to admit petitioner Muir and other Negroes was required by state law; and in so acting, respondent clearly acted as an instrumentality of the state in carrying out state policy. *Nixon* v. *Herndon,* 273 U. S. 536; *cf. Civil Rights Cases,* 109 U. S. 3, 17; *Public Utilities Commission of the District of Columbia* v. *Pollak,* 343 U. S. 451; 461-62; *Nash* v. *Air Terminal Services,* 85 F. Supp. 545, 549 (E. D. Va. 1949).

A recent occurrence highlights this point. In June, 1953, there was presented at Iroquois Amphitheatre for a three-week run a musical drama based on the life of President Lincoln. To these performances Negroes were admitted. The New York Times reported on June 18, 1953 that *Mayor Charles P. Farnsley of Louisville had temporarily lifted "[t]he historic ban against admitting Negroes to Louisville's white city parks"* (p. 38, col. 1). This serves to dramatize the crucial fact that it is city policy and city action which determines whether, if at all, Negroes are admitted to Iroquois Amphitheatre. In the light of this, respondent's contention that there is no showing that petitioner has been denied the use of the Amphitheatre becomes especially transparent.

The conclusion thus becomes inescapable that when respondent denied petitioner admittance to the Amphitheatre, it acted for the state and under color of state law.

Conclusion.

WHEREFORE, for the reasons hereinabove stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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